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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court

BRIEF FOR RESPONDENTS JAMES HENRY AND WILLIAM BRINER IN OPPOSITION TO PETITION FOR CERTIORARI

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Since petitioners do not object to the order dismissing the respective counties in this proceeding, this brief will discuss only those issues pertinent to respondents, James Henry and William F. Briner, who are sued as members of the Tahoe Regional Planning Agency (hereinafter called TRPA) legislative body.

OPINION BELOW

The opinions of the courts below are appended to the petition for certiorari.

JURISDICTION

Respondents do not contest that this Court, technically, has jurisdiction pursuant to 28 U.S.C. §1254(1); it is submitted, however, that the case is not yet ripe for review.

QUESTIONS PRESENTED

1. Respondents, Briner and Henry, are elected members of the Placer County Board of Supervisors. The Tahoe Regional Planning Compact (Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360, Art. III(a)), requires that they serve on the governing board of the Tahoe Regional Planning Agency. Articles V and VI of said Compact require that they enact ordinances and regulations for the protection of the environment of the Lake Tahoe Region.

> Are members of the legislative body of the Tahoe Regional Planning Agency entitled to absolute immunity for the enactment of land use ordinances and regulations designed to protect the Lake Tahoe environment as required by the Tahoe Regional Planning Compact?

2. The Court of Appeals held that a cause of action may be stated for violation of the Fifth Amendment rights by one acting under color of federal law pursuant to 28 U.S.C. §1331. This statute has never been construed as authorizing an action for damages based upon land use regulation. Unless this Court sees fit to broaden the jurisdiction under this section to authorize damages for any claimed violation of constitutional rights, then the decision of the Court of Appeals granting absolute immunity should be upheld on the independent ground that Section 1331 does not authorize an award for damages for land use regulation.

> Does 28 U.S.C. §1331 authorize an award of damages against individuals acting under color of federal law in the area of land use regulation?

3. The cases below were decided on the pleadings alone. The record before the Court of Appeals was extremely sparse. The complaints were based upon enactment, implementation and enforcement of the Lake Tahoe Regional General Plan. It is not possible, from the reading of the record, to determine precisely what petitioners are complaining about. In effect, this Court is being asked to render an advisory opinion regarding the liability for administering and enforc-

ing the TRPA Plan, without knowing whether the actions complained of were legislative or executive, and without knowing any of the facts forming the foundation for the litigation.

> Is a case against the individual legislators of the Tahoe Regional Planning Agency ripe for review by the Supreme Court without the benefit of a record showing the precise actions taken by the individuals, or the effect of such actions on the petitioners?

STATUTES INVOLVED

The statutes involved are these:

1. Tahoe Regional Planning Compact, Public Law No. 91-148, 83 Stat. 360. The text thereof is appended to the petition for certiorari as Appendix E.
2. The Eleventh Amendment to the Constitution of the United States.
3. 28 U.S.C. §1331.

STATEMENT OF THE CASE

In 1968, California and Nevada entered into a Compact to create a regional agency for the purpose of protecting the environment of the Lake Tahoe Basin (Cal. Gov't Code §§66800, et seq.; Nev. Rev. Stat. §§277.190 et seq.). The Compact was consented to by Congress in 1969 (Pub. L. No. 91-148, 83 Stat. 369).

Respondents Briner and Henry were elected members of the Placer County Board of Supervisors, and the only supervisors who were residents of the county supervisorial district line within the Tahoe Basin. Accordingly, they were required by the Compact to serve as members of the governing body of the TRPA (see Compact, Art. III(a)).

> "There is created the Tahoe Regional Planning Agency as a separate legal entity.
>
> "The governing body of the Agency shall be constituted as follows:
>
> "One member appointed by each of the county boards of supervisors of the Counties of El Dorado and Placer, and the one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the City Council or County Board of Supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region. . . ."

Article V of said Compact requires that the Agency establish a regional plan designed to regulate land use, water and air quality, transportation, public services, etc., for the purpose of conserving the environment of the Basin.

Article VI of said Compact requires that the governing body adopt all necessary ordinances, rules, regulations and policies to effectuate said plan, and requires that the Agency enforce all such ordinances and regulations.

Various individuals complained that the enactment, implementation, and enforcement of the ordinances and regulations violated their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The District Court dismissed each of the actions. The Ninth Circuit held that, although the individual governing board members were immune from suit for enactment of ordinances pursuant to the Compact, the Court was unable to determine from the record whether the acts complained of arose by reason of the officer's exercise of legislative or executive powers. Accordingly, the cases were remanded to the District Court for further factual development as to the nature of the challenged actions.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. MEMBERS OF THE TRPA GOVERNING BODY ARE REGIONAL LEGISLATORS, ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY.

Petitioners attempt to characterize the TRPA governing board as something akin to the directors of a school district or a subordinate state agency, performing purely local functions. Nothing could be further from the truth.

The protection of the Lake Tahoe environment is a matter of national importance, transcending the interests of any state or local governmental entity.

The national interest in Lake Tahoe and its environment is pointed out in the article, "Lake Tahoe: The Future of a National Asset—Land Use, Water, and Pollution" (52 Calif. L. Rev. 563 (1964):

> "In *Roughing It,* Mark Twain wrote of lake Tahoe: 'As it lay there with the shadows of the mountains brilliantly photographed upon its surface I thought it must surely be the rarest picture the whole earth affords.' Since its discovery in 1844 by John C. Fremont, Lake Tahoe's natural beauty and the surrounding area's scenic attraction has been praised by both permanent residents and an increasing flood of tourists. Situated geographically in a climate which makes possible year-round use as a recreation center, it lies within a four-hour drive of some 3 million people and scarcely more than a one-day's drive of nearly 10 percent of the total population of the United States."

See also S.Rep. 91-510, 91st Cong., 1st Sess. (1969), 115 Cong. Rec. 33068-33069 (1969).

> "Only two other sizeable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development."

In 1971, the Counties of Placer and El Dorado challenged the authority of TRPA over land use control. The Counties' contention was that land use control is essentially a local affair, committed to the exclusive jurisdiction of the counties under the pro-

visions of the California Constitution. This challenge was rejected by the California Supreme Court in the *Case of People, ex rel. Younger v. County of El Dorado,* 5 Cal.3d 480, 486 P.2d 1193 (1971).

The Court stated, at page 486:

> "Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development."

The Court concluded, at page 494:

> "Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is a product of the cooperative effort and mutual agreement of two States is impressive proof that its subject matter and objectives are of regional rather than local concern."

Article VI(b) requires that all ordinances, rules, regulations and policies adopted by the Agency shall be enforced not only by the counties and cities, but also by the respective states. At least to this extent, the power of the Agency and its legislative body transcends even the powers of the states.

Clearly, the duties exercised by the legislative body of the TRPA are of regional and even national importance. Accordingly, they should be granted the same legislative immunity granted to state and federal legislators.

B. POINTS AND AUTHORITIES DISTINGUISHED

The authorities cited by petitioners wherein only qualified immunity was granted did not involve legislative acts.

Procunier v. Navarette, ... U.S. ....., 55 L.Ed.2d 24 (February 1978), held that State Prison officials are entitled to qualified immunity in civil rights actions under 42 U.S.C. §1983, for violation of prisoners' First Amendment rights.

O'Connor v. Donaldson, 422 U.S. 563 (1975), was a case brought by a former mental patient pursuant to Section 1983, alleging that the director of the mental hospital had violated his constitutional right to liberty by confining him in a State Mental Hospital for nearly 15 years for purely custodial purposes, although the patient was not a danger to himself or others, and responsible persons had indicated a willingness to help care for the patient upon his release.

Wood v. Strickland, 420 U.S. 308 (1975), was a civil rights suit against members of a school board for wrongful expulsion of a student. The case did not involve either the validity of the regulations or the potential liability for enactment thereof. The decision was based on alleged expulsion of students without any basis whatsoever.

In reversing the Court of Appeals, this Court held, at page 326:

> "Given the facts that there *was* evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the Federal Courts to set

aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."

Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977), involved purposeful racial discrimination on the part of members of a school district with respect to salaries, assignments, promotion, and hiring of black faculty members.

Hostrop v. Board of Junior College Districts, 523 F.2d 569 (7th Cir. 1975), was a civil rights action involving the termination of a junior college president without affording him the due process right to a hearing.

Jones v. Diamond, 519 F.2d 590 (5th Cir. 1975), held that the members of the Board of Supervisors are entitled to qualified immunity for alleged violation of a Mississippi ordinance which required them to examine into the state of the jail at least once in every three months, and further alleging that the supervisors, sheriff, and other defendants discriminated against black prisoners by excessive confinement in cells, unsanitary and unsafe conditions, mail censorship, physical abuse, inadequate medical attention, contaminated food, and other similar complaints.

Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), was an action against individual supervisors for violation of a Mississippi statute which required that they provide for the safekeeping, clothing, housing, etc., of prisoners at a county youth farm. The decision of the trial court dismissing the individual members of the Board of Supervisors was sustained. The Court held, at page 985:

"In the final analysis, plaintiff cannot point to any individual act of a supervisor as having a causal relation to the subject matter of this litigation and the personal injuries sustained by plaintiff. . . ."

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), held that the Mayor and City Councilmen were immune from good faith enforcement of ordinances which had the effect of destroying plaintiff's business, whether or not such ordinances were constitutional.

Cobb v. City of Maulden, 202 F.2d 701 (1st Cir. 1953), held that a civil rights action could be brought against city officials for conspiracy to violate the contract rights of school teachers by refusing to grant salary increases required by pre-existing contracts.

Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976), was a case in which supervisors were charged with discriminating against members of a labor union by paying them lower wages than non-union members, and by falsely bringing charges against them in an attempt to have them removed from their jobs. In remanding the case for further proceedings, the Ninth Circuit held, at page 1173:

"The questioned activity may or may not share in the 'speech and debate' immunity conferred upon legislators (cf. *Gillibeau v. City of Richmond,* 417 F.2d 426 (9th Cir. 1969))."

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), upheld a District Court decision in favor of the mayor, city manager and city commissioners in an action by

a garage owner for allegedly passing and enforcing discriminatory ordinances. The discusssion of qualified versus absolute immunity cited by petitioner was pure dicta.

Scheuer v. Rhodes, 416 U.S. 232 (1974), was a case involving the killing of students at Kent State University. There was no factual record before this Court, and this Court declined to define the scope of executive immunity.

A review of the cases cited by petitioner shows that the doctrine of absolute legislative immunity has been followed, not only by this Court, but by each other Court which has squarely decided the issue. A doctrine of qualified, rather than absolute immunity, has been invoked only in those cases where individuals were acting in a ministerial or executive capacity, as opposed to a legislative capacity.

Contrary to petitioner's argument, the Ninth Circuit's opinion granting absolute immunity to members of the TRPA governing body for legislative acts is founded on sound and virtually unchallenged authority. Those cases invoking the doctrine of qualified immunity are simply not in point.

C. PETITIONERS' REMEDY AGAINST MEMBERS OF THE TRPA LEGISLATIVE BODY SHOULD BE RESTRICTED TO DECLARATORY OR INJUNCTIVE RELIEF.

The members of the TRPA governing body are charged with a heavy responsibility in preserving a valuable national asset.

The dividing line between necessary regulation for the protection of the Lake Tahoe environment and impermissive restriction on private property rights is practically imperceptible. No clear guidelines have been drawn by the courts in this area. Each parcel of property is unique, and the weighting of environmental concerns vis-a-vis property rights varies with each case.

If, by the enactment and implementation of the TRPA regulations, the development plans of some land speculators are restricted unduly, such rights can be restored by way of injunctive or declaratory relief.

The alternative of subjecting governing board members to the spectre of personal liability to such speculators could well inhibit the bold and innovative efforts necessary to preserve Lake Tahoe, and instead, result in faint-hearted and timorous regulation, permissive over-development, and irreparable harm to the environment of the Lake Tahoe Basin.

As this Court held, in *Tenney v. Brandhove,* 341 U.S. 367 (1951) at page 377:

> "One must not expect uncommon courage, even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

It is submitted that this same policy principle should be applied in this case and that the Court's jurisdic-

tion under 28 U.S.C. Section 1331 should be limited to declaratory or injunctive relief.

The Court of Appeals held that *Bivens v. 6 Unknown-named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), might be applicable to a damage action for discriminatory enforcement of the TRPA regulations. Without a factual record, however, the Court was unable to determine whether this is an appropriate case for the application of *Bivens.*

Bivens, however, has never been extended to provide a damages remedy for the enforcement of land use regulations. It is submitted that there is nothing in the record which would justify extending the *Bivens* theory to this case.

Bivens was the innocent victim of an unreasonable search and seizure by narcotics agents. As pointed out by Justice Harlan in his concurring opinion (430 U.S., at page 409):

> "Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common law actions, it is apparent that some form of damages is the only possible remedy for someone in *Bivens'* alleged position."

In all of the cases wherein damages were awarded under the *Bivens* theory, there was no other practicable remedy available to the injured person. In cases such as this, however, the enactment or enforcement of land use regulations can be remedied by injunctive or declaratory relief, and there is no need to extend the common law remedies to an action for damages against the governing board members.

As was pointed out in *Kosta v. Hogg,* 560 F.2d 37 (1st Cir. 1977) at page 42:

> "When there is a request for the judicial creation of a supplemental damages remedy arising directly under a constitutional provision, *Bivens,* we think, teaches that a federal court should proceed with caution."

Accordingly, upon the present state of the record, the decision of the Ninth Circuit granting absolute immunity to members of the governing board should be sustained on the independent ground that 28 U.S.C., Section 1331, does not authorize an award of damages against individual governing board members (see *Walling v. General Industries Company,* 330 U.S. 545 (1947): Respondent is entitled to urge, in opposition to a writ of certiorari, matters decided contrary to respondent's position, without the necessity of filing a cross-petition for certiorari).

D. THE CASE BEFORE THE COURT IS NOT RIPE FOR REVIEW

In the case of *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company, et al.,* 380 F.2d 570 (1967), the Union appealed from a contempt order of the District Court. The Court of Appeals ruled on various legal issues, including the following: The Court upheld the Trial Court's denial of a Motion for Disqualification of the Trial Court Judge; upheld the denial for a Request for a Jury Trial; upheld the Trial Court's decision

that the appellees had standing to sue; and held that the underlying Restraining Order cannot be attacked in the contempt proceedings. The Appellate Court, however, remanded to the District Court to consider whether there was in fact a contempt, and if so, whether it was of such magnitude as to warrant the substantial fines imposed.

The Union filed a Petition for Certiorari asking this Court to review the various adverse decisions by the Court of Appeals. This Court, in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company, et al.*, 389 U.S. 327, 19 L.Ed.2d 560 (1967) denied the Petition for Certiorari, holding that the case was not yet ripe for review because it had been remanded by the Court of Appeals for further factual development.

In the instant case, also, the Court of Appeals remanded for the purpose of developing a factual record.

This Court should not be required to rule on the liability of individual defendants for enactment, enforcement, and implementation of TRPA Land Use Ordinances in the abstract.

It is submitted that the record before this Court is simply not sufficient to enable the Court to arrive at an informed decision of the various legal issues.

Until it is determined specifically what actions Plaintiffs are complaining about, the effect of such actions on Plaintiffs, and whether such actions were legislative or executive in nature, the case is not ripe for review.

CONCLUSION

Petitioners have raised no substantial federal question. The doctrine of absolute legislative immunity has been consistently followed by this Court, and is particularly applicable to this case. Whether Petitioners might be able to state a cause of action on some theory outside the present state of the record is an abstract and speculative question which this Court should not be required to decide.

The Petition for Certiorari should be denied.

Dated, May 3, 1978.

Respectfully submitted,

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